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No. 89-1462

In the Supreme Court of the United States

OCTOBER TERM, 1989

THOMAS M. HAAS, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the delay in filing for revocation of petitioner's probation violated the Due Process Clause of the Fifth Amendment or otherwise barred the district court from revoking probation.

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OPINIONS BELOW

The order of the court of appeals (Pet. App. 1a) is unpublished, but the decision is noted at 891 F.2d 906 (Table). The memorandum opinion of the district court (Pet. App. 3a-5a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 15, 1989. A petition for rehearing was denied on December 21, 1989. Pet. App. 2a. The petition for a writ of certiorari was filed on March 19, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After pleading guilty in the United States District Court for the Southern District of Alabama, petitioner was convicted on one count of conspiracy to import marijuana, in violation of 21 U.S.C. 963, and was placed on probation for five years. The district court later revoked petitioner's probation and sentenced him to a term of five years' imprisonment. The court of appeals affirmed without opinion.

1. In January 1984, petitioner pleaded guilty to one count of conspiracy to import approximately 400 pounds of marijuana, in violation of 21 U.S.C. 963.[1] Petitioner had served as a pilot in a marijuana smuggling operation. One of petitioner's friends, Lucious Allen Tharp, was convicted on unrelated marijuana smuggling charges and later sentenced to a term of imprisonment. The district court first sentenced petitioner to a provisional term of five years' imprisonment under 18 U.S.C. 4205(c). In February 1985, the district court suspended that sentence and placed petitioner on probation for a term of five years. Gov't C.A. Br. 2, 6.

The terms of petitioner's probation included, among other conditions, that petitioner "refrain from violation of any law (federal, state or local) * * * [and] get in touch immediately with [his] probation officer if arrested or questioned by a law-enforcement officer" (Condition 1), Pet. App. 3a, that he "associate only with law-abiding persons" (Condition 2), *ibid.*, and that he "refrain from contact or activities which would give reasonable cause to believe [he has] violated any criminal law" (Condition 9), *id.* at 4a. In addition, Special Condition 7 provided that "[i]f [petitioner] is contacted by persons wanting him to engage in any

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[1] The pertinent facts, which petitioner does not dispute here, are summarized in the government's briefs in the district court and court of appeals. See Gov't D.C. Br. 3-14; Gov't C.A. Br. 2-18.

illegal activities, he should immediately notify the Probation Officer, his father, or other appropriate law enforcement authorities," [2] and it specifically prohibited petitioner from "act[ing] as an informant in any capacity." *Ibid.*

2. Petitioner's adjustment to probation was routine until he renewed his association with Tharp. On October 31, 1986, petitioner met Tharp at a hotel coffee shop in Mobile, Alabama. Tharp, who remembered that petitioner was a pilot, sought petitioner's help in finding an airplane capable of smuggling narcotics from Colombia into the United States. Petitioner agreed to help. Petitioner also leased his own twin-engine plane to Tharp so that Tharp could look for a suitable plane as well. Petitioner and Tharp devised a cover story that the plane they were seeking would be used in Tharp's otherwise legitimate watermelon business. Gov't C.A. Br. 6-7.[3]

Petitioner called Tharp several weeks later asking him to return petitioner's plane. Petitioner explained that he had found a suitable plane for Tharp's needs, an Aerocommander. Petitioner also told Tharp that the plane would have to be inspected at Tharp's expense. Tharp agreed to pay petitioner for locating the Aerocommander and allow him to keep the plane after Tharp completed the smuggling trip. From November 1986 to January 1987, Tharp gave petitioner $8,100 to cover the cost of having the Aerocommander inspected and refurbished for the trip to South America. In addition, Tharp paid petitioner $3,700 for leasing petitioner's plane. Gov't C.A. Br. 7-8. During those months, petitioner showed the Aerocommander to Tharp's

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[2] As petitioner notes (Pet. 4 n.1), the district court designated petitioner's father – an attorney – as a special advisor to assist in supervising petitioner's probation. Gov't C.A. Br. 2.

[3] The file of petitioner's probation officer, Charles Perkins, contained no notation that petitioner had informed him of Tharp's solicitation. See Gov't C.A. Br. 15.

pilots who were assigned to the smuggling venture and talked to them about the plane's ability to fly at low altitudes. In late January or early February 1987, petitioner flew the plane to Panama City, Florida, where he attended a pilot training course. Gov't C.A. Br. 8-9.

By this date, federal authorities had initiated a criminal investigation of Tharp's activities. Neither Tharp nor petitioner was aware of that investigation. On February 6, however, Customs Agent Betty Commerford tracked the Aerocommander to Panama City and started making inquiries about the plane. Petitioner got wind of the agent's actions and then met with her. Petitioner explained that he was trying to sell the Aerocommander to Tharp. He stated that he did not think the deal would close but that if it did, he would notify the federal authorities in Mobile. Gov't C.A. Br. 9-10; see Tr. 124.[4] On February 9, petitioner met with Customs Special Agent Kyle Barnette in Mobile. During that interview, petitioner stated that he was brokering Tharp's purchase of the Aerocommander. Petitioner acknowledged that Tharp was a narcotics smuggler, but stated that he did not know how Tharp intended to use the plane. Gov't C.A. Br. 11.

As events unfolded, Tharp did not use the Aerocommander that petitioner had located, but used another plane

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[4] Petitioner telephoned his father on February 7, evidently to speak to him about the unfolding business with Tharp. Petitioner's father instructed him to contact his probation officer, Charles Perkins, and DEA Task Force agent Ed Odom. See Gov't C.A. Br. 14; Tr. 110-111.

On February 9, petitioner tried to contact both Perkins and Odom. See Gov't C.A. Br. 14. Odom was evidently unavailable, but according to petitioner, an unidentified agent told him to "go ahead and talk to the Customs people." Tr. 112. Petitioner testified that Perkins advised him to do the same. *Ibid.* In his affidavit, Perkins did not specifically recall speaking to petitioner on that date, although he did state that petitioner had called him sometime before the summer of 1987. See Gov't C.A. Br. 16-17; see also note 12, *infra*.

in his smuggling operation. On February 17, Customs agents arrested Tharp in Florida after that plane arrived carrying a load of 350 kilograms of cocaine. Tharp told the agents that petitioner knew from their initial meetings that Tharp needed a plane for narcotics smuggling. Gov't C.A. Br. 10; Tr. 11, 20-22, 67.

On February 24, Customs agents seized the Aerocommander petitioner had tried to sell to Tharp. After that seizure, petitioner contacted DEA Task Force agent Odom in order to explore the possibility of having the plane returned to its owner. Petitioner told Agent Odom that he had helped Tharp find the Aerocommander because he believed that Tharp needed the aircraft for his watermelon business. Petitioner explained that he had "believed [Tharp] was telling the truth at the time and he did not realize [Tharp] was involved in any illegal activity." Tr. 56; see Pet. App. 13a; Gov't C.A. Br. 11.

In light of petitioner's complicity in Tharp's thwarted smuggling operation, the case agent overseeing the investigation and Tharp's prosecution in the Middle District of Florida urged petitioner to testify as a cooperating witness for the government at Tharp's trial in mid-August 1987. Petitioner agreed to do so.[5] Petitioner later testified at

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[5] Petitioner agreed to testify without receiving immunity. Petitioner understood that the government would notify the district court supervising his probation of his cooperation. Gov't C.A. Br. 12.

Shortly before Tharp's trial began, the government notified the district court supervising petitioner's probation that it had information that petitioner was involved in Tharp's smuggling activities and that petitioner had agreed to testify as a government witness. See Letter from Gloria A. Bedwell, Assistant United States Attorney, to W.B. Hand, United States District Judge (Aug. 3, 1987) (sealed). The government also sought the court's permission to use petitioner as a cooperating informant in an investigation being conducted by the Customs Service. *Ibid.* The court held a conference and later denied that request.

Tharp's trial that he had known that Tharp was looking for a plane to smuggle narcotics. Petitioner explained that he would have received both the Aerocommander and $50,000 if Tharp had used the plane and the mission had succeeded. Petitioner also admitted that his dealings with Tharp amounted to a violation of the terms of his probation. Gov't C.A. Br. 12-13; Pet. App. 13a.[6] After Tharp's trial, petitioner's probation officer asked petitioner to provide a written statement detailing his participation in Tharp's illicit activities. Petitioner provided such a statement on August 18, 1987. Gov't C.A. Br. 15; Pet. App. 13a.

3. On November 22, 1988, petitioner's new probation officer, Donna Alexander,[7] filed in the district court a petition for revocation of his probation based on petitioner's complicity in Tharp's smuggling operation. The petition alleged that petitioner had violated the conditions of his probation by failing to notify his probation officer about his testimony at Tharp's trial in August 1987 (Condition 1),[8] by associating with Tharp in connection with his smuggling activities from late October 1986 to February 1987 (Condition 2), by involving himself with criminal activity during that period (Condition 9), and by failing to notify his probation officer when first solicited by Tharp in October

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[6] Tharp was convicted and later sentenced to a term of 13 years' imprisonment. Gov't C.A. Br. 13.

[7] In September 1988, Alexander had replaced Charles Perkins as petitioner's probation officer. At that time, Perkins left the probation service. Pet. 4.

[8] Given the government's full knowledge concerning petitioner's cooperation in the Tharp prosecution, see note 5, *supra*, this particular charge appears to have been unwarranted. In any event, the district court did not specifically address the extent to which petitioner violated the terms of his probation (including Special Condition 7) by failing to report promptly to his probation officer regarding his various dealings with Tharp and the resulting investigation.

1986 (Special Condition 7). Pet. App. 3a-4a. On November 23, the district court issued a summons and scheduled the probation revocation hearing for December 15, 1988. Gov't C.A. Br. 3-4.

4. The district court held the hearing on that date and, on petitioner's request, reconvened the hearing to receive additional evidence on January 6, 1989. In light of the evidence adduced at the hearing, the district court found that petitioner had violated the conditions of his probation.[9] Specifically, the district court found that petitioner had "associated with a known felon, Lucious Allen Tharp[,] * * * [in] direct violation of Condition 2." Pet. App. 4a. In addition, the court found that petitioner

> knew that Mr. Tharp was participating in an illegal activity, i.e., the illegal importation of contraband, yet continued to associate with Mr. Tharp, and in fact participated in said activity by attempting to secure, and securing an airplane for use in furtherance of [that] activity.

Ibid. The court determined that petitioner had therefore violated Conditions 1, 2, and 9 of his probation. Accordingly, on February 15, 1989, the court revoked the term of probation previously imposed and sentenced petitioner to a term of five years' imprisonment. *Id.* at 4a-5a.[10]

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[9] The district court issued its order on February 15, 1989. The district court apparently did not credit petitioner's testimony that he was unaware of Tharp's intentions until February 7, 1987, at which time he reported the incident to Probation Officer Perkins and another federal agent. See Tr. 100-113; see also note 4, *supra*. Petitioner's contrary testimony at Tharp's trial—which was received into evidence at the probation revocation hearing—showed that petitioner was well aware of Tharp's plans and stood to profit if Tharp had succeeded.

[10] Petitioner was remanded to the custody of the Attorney General on February 22, 1989. He reported to his designated institution on

5. On March 6, 1989, petitioner filed in the district court a motion for reconsideration contending, among other claims, that the "unreasonable delay in the bringing of the charges prejudice[d] the probationer and [was] fundamentally unfair." Pet. D.C. Br. and Argument at 3, *United States* v. *Haas*, No. 84-00005 (S.D. Ala.).[11] Petitioner pointed out that "the alleged violations of probation * * * occurred approximately two years prior to the filing of the petition for revocation," and that "[t]he alleged inappropriate conduct had long since been made known to the Probation Office, the United States Attorney's Office and to [the] Court." *Ibid.*[12]

March 7, 1989. See R.E. 5. ("R.E." refers to the Record Excerpts filed with petitioner's brief in the court of appeals).

[11] On February 22, the district court denied petitioner's first motion for reconsideration challenging the sufficiency of the evidence. Order, *United States* v. *Haas*, No. 84-00005 (S.D. Ala.). After receiving an ex parte communication from petitioner's father, however, the district court on February 27 vacated its earlier order and directed petitioner to submit a memorandum setting forth his basis for challenging the court's earlier findings. Order, *United States* v. *Haas*, No. 84-00005 (S.D. Ala.).

[12] Petitioner submitted a number of affidavits, including a statement taken from his former probation officer, Charles Perkins, who did not testify at the probation revocation hearing. See Affidavit of Charles A. Perkins (Mar. 5, 1989), Exh. B to Defendant's Mem., *United States* v. *Haas*, No. 84-00005 (S.D. Ala. filed Mar. 6, 1989). Perkins stated that "[a]t the time [he] left the probation service [in September 1988, he] did not personally know of any reason why a petition to revoke [petitioner's] probation should be filed." Exh. B, at 1-2, to Defendant's Mem., *supra*. Perkins also stated that, as a result of his attending a conference with the district court in August 1987, see note 5, *supra*, he knew that petitioner was scheduled to testify as a government witness at Tharp's trial in Florida. Exh. B, at 2, to Defendant's Mem., *supra*. Moreover, Perkins related "[his] understanding after this meeting at Judge Hand's office that there would be no action taken against

After receiving the government's response in opposition to petitioner's motion,[13] the district court denied that motion. Order, *United States* v. *Haas*, No. 84-00005 (S.D. Ala. Mar. 27, 1989). The court stated that it "remain[ed] reasonably satisfied that [petitioner's] conduct was not in compliance with the conditions of probation." Order at 1, *supra*. The court therefore affirmed its order revoking petitioner's probation.

6. In the court of appeals, petitioner argued (Pet. C.A. Br. 34-39) that the government (including his probation officer) knew of his alleged violations of probation since early February 1987, but waited until late November 1988 to file the revocation petition. He contended that such a substantial delay in seeking revocation of probation violated the Due Process Clause of the Fifth Amendment and otherwise barred the district court from revoking probation.[14] The court of appeals rejected that argument and affirmed without opinion. Pet. App. 1a.

[petitioner] unless he was prosecuted in connection with the matter down in Florida that we met concerning." *Id.* at 3.

[13] The government's response did not address petitioner's contention regarding the delay in commencing probation revocation proceedings.

[14] The government contended that the delay in filing the probation revocation petition did not warrant relief, because petitioner did not establish that that delay prejudiced him or that the delay was the result of the government's deliberate attempt to gain a tactical advantage. See Pet. App. 8a-15a.

Petitioner also contended that there was insufficient evidence to show that he had violated the conditions of his probation, Pet. C.A. Br. 39-42, that the district court had abused its discretion at sentencing, *id.* at 42-44, and that the revocation hearing was not conducted in accord with Fed. R. Crim. P. 32.1, Pet. C.A. Br. 45-46. The court of appeals rejected those claims, and petitioner does not present them for further review here.

ARGUMENT

1. Petitioner renews his contention (Pet. 5-11) that the substantial delay in filing the petition for revocation of probation violated the Due Process Clause of the Fifth Amendment and otherwise barred the district court from revoking probation. As this Court has recognized:

> Because the probation or parole officer's function is not so much to compel conformance to a strict code of behavior as to supervise a course of rehabilitation, he has been entrusted traditionally with broad discretion to judge the progress of rehabilitation in individual cases, and has been armed with the power to recommend or even to declare revocation.

Gagnon v. *Scarpelli*, 411 U.S. 778, 784 (1973); see *Griffin* v. *Wisconsin*, 483 U.S. 868, 875 (1987). A probation officer, for example, may wait to assess the effect of suspected violations before initiating revocation proceedings. See, *e.g.*, *Morrissey* v. *Brewer*, 408 U.S. 471, 479 (1972). Courts have therefore been reluctant to require probation officers to petition for revocation on the first indication that the probationer has violated the conditions of his sentence. See, *e.g.*, *United States* v. *Hamilton*, 708 F.2d 1412, 1415 (9th Cir. 1983); *United States* v. *Rice*, 671 F.2d 455, 458 (11th Cir. 1982).

Nevertheless, the Due Process Clause applies to probation revocation proceedings, and thus those proceedings—like other governmental actions affecting an individual's liberty—must not be "fundamentally unfair or arbitrary." *Bearden* v. *Georgia*, 461 U.S. 660, 666 (1983); see *Black* v. *Romano*, 471 U.S. 606, 611 (1985); *Gagnon* v. *Scarpelli*, 411 U.S. 778, 782 & n.4 (1973); see also Fed. R. Crim. P. 32.1. The Due Process Clause has a role, albeit a limited one, "in protecting against oppressive delay" in the filing of criminal charges. *United States* v. *Lovasco*, 431 U.S. 783,

789 (1977). That limited constitutional protection, the Court has held, *id.* at 789-790, is available only when the defendant's claim satisfies a two-part test. The defendant must actually have been prejudiced by the delay, and the government's reasons for the delay must be such as to make compelling the defendant to stand trial a violation of those "fundamental conceptions of justice which lie at the base of our civil and political institutions and which define the community's sense of fair play and decency." *Id.* at 790 (citations and internal quotation marks omitted).[15]

In applying the *Lovasco* standard, federal courts have generally held that relief is available only if the defendant is prejudiced and the government intended to delay the initiation of proceedings in order to obtain a tactical advantage over the defendant. *E.g.*, *United States* v. *Ismaili*, 828 F.2d 153, 166 (3d Cir. 1987), cert. denied, 485 U.S. 935 (1988); *United States* v. *Hoo*, 825 F.2d 667, 671 (2d Cir. 1987), cert. denied, 484 U.S. 1035 (1988); *United States* v. *Lebron-Gonzalez*, 816 F.2d 823, 831 (1st Cir.), certs. denied, 484 U.S. 843, 857 (1987); *United States* v. *Caporale*, 806 F.2d 1487, 1514 (11th Cir. 1986), certs. denied, 482 U.S. 917, 483 U.S. 1021 (1987); *United States* v. *Jenkins*, 701 F.2d 850, 854 (10th Cir. 1983); *United States* v. *Atisha*, 804 F.2d 920, 928 (6th Cir. 1986), cert. denied, 479 U.S. 1067 (1987). That reading of *Lovasco* is in accord with the Court's statement in *United States* v. *Gouveia*, 467 U.S. 180, 192 (1984), that "the Fifth Amendment requires the dismissal of an indictment * * * if the defendant can prove that the

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[15] In *Lovasco*, the Court held that, while the second part of the due process test could be satisfied where the government sought "to gain [a] tactical advantage over the accused," 431 U.S. at 795 (quoting *United States* v. *Marion*, 404 U.S. 307, 324 (1971)), it is not satisfied by investigative delay, *i.e.*, fundamental conceptions of justice are not offended when the delay is due to the government's continued criminal investigation, 431 U.S. at 790-796.

Government's delay in bringing the indictment was a deliberate device to gain an advantage over him and that it caused him actual prejudice in presenting his defense." See *Arizona* v. *Youngblood*, 109 S. Ct. 333, 337 (1988).[16]

The probation officer's decision to institute revocation of probation proceedings, like the prosecutor's decision to seek formal criminal charges, is largely a discretionary decision that affects an individual's liberty interest. In light of the similarities between these two important stages of the criminal justice process, a delay in filing a petition for revocation of probation should be subject to the same due process constraints that the Court articulated in *Lovasco*, and relief should be granted only in circumstances in which a due process violation would be found under the *Lovasco* standard. See *United States* v. *Brown*, 656 F.2d 1204, 1208 (5th Cir. 1981) (relief denied where delay in filing probation revocation petition did not prejudice probationer), cert. denied, 454 U.S. 1156 (1982); *Kartman* v. *Parratt*, 535 F.2d 450, 455 (8th Cir. 1976) (same principle applied to delay in holding parole revocation proceeding).

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[16] A minority view among the federal courts, in decisions predating *Arizona* v. *Youngblood*, 109 S. Ct. 333 (1988), treats *Lovasco* as not requiring an intentional seeking of tactical advantage or recklessness on the part of the prosecution. Those courts instead have suggested or held that less reprehensible governmental reasons for delay, assessed in light of the prejudice caused by the delay, can be sufficient to establish a violation of the Due Process Clause. See, *e.g.*, *United States* v. *Moran*, 759 F.2d 777, 782-783 (9th Cir. 1985), cert. denied, 474 U.S. 1102 (1986); *United States* v. *Townley*, 665 F.2d 579, 581-582 (5th Cir.), cert. denied, 456 U.S. 1010 (1982).

Here, petitioner does not claim that the delay in filing the probation revocation petition prejudiced his ability to defend the charges. For that reason, petitioner would not be entitled to relief under either formulation of the *Lovasco* standard. This case therefore does not present an occasion for the Court to address that issue.

Here, it is undisputed—and the record confirms—that petitioner violated the conditions of his probation by helping Tharp in his drug smuggling efforts from late October 1986 through early February 1987. Although the government certainly knew of petitioner's illicit activity in February 1987, the government, including petitioner's probation officer, did not learn the full extent of his participation until August 1987, after petitioner had testified at Tharp's trial and admitted his complicity in Tharp's narcotics smuggling efforts. The probation revocation petition was not filed until late November 1988, and therefore the pertinent period of delay is 15 months.[17]

Petitioner does not claim that the delay in filing the probation revocation petition prejudiced his ability to defend the charges. Indeed, the record makes plain that petitioner mounted a vigorous defense of those charges before the district court through the testimony and submissions of relevant witnesses. And petitioner did not even raise the issue of delay until the second motion for reconsideration after the district court had already issued its decision revoking probation. In these circumstances, the court of appeals correctly rejected petitioner's claim that the delay in filing for revocation of his probation violated the Due Process Clause or otherwise barred the district court from revoking probation. See *United States* v. *Rice*, 671 F.2d at 457-458 (17-month delay between probation officer's learning of

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[17] For that reason, petitioner is wrong in contending (Pet. i, 5 n.2, 10 n.4) that the relevant period of delay is 22 months, *i.e.*, commencing in February 1987, when the government first became aware of petitioner's involvement with Tharp. Petitioner properly refrains from embracing the view—rejected by federal courts—that a probation officer must petition for revocation on the first indication that the probationer has violated the conditions of his sentence. See, *e.g.*, *United States* v. *Hamilton*, 708 F.2d at 1415; *United States* v. *Rice*, 671 F.2d at 458.

violation and filing of revocation petition did not constitute due process violation).[18]

2. Petitioner contends (Pet. 7-10) that the court of appeals' decision conflicts with the decisions in *United States* v. *Tyler*, 605 F.2d 851 (5th Cir. 1979), and *United States* v. *Hamilton*, 708 F.2d 1412 (9th Cir. 1983), where the courts awarded relief based on substantial delays in filing probation revocation petitions without regard to any prejudice suffered by the probationer. In *Tyler*, which involved a delay of 27 months, the probation officer had also deliberately withheld the violations on which revocation was based from an earlier unsuccessful revocation proceeding. 605 F.2d at 852-853. In those circumstances, the Fifth Circuit held that "such a lengthy delay, coupled with the probation officer's obvious decision not to file these charges in the first petition, is fundamentally unfair." *Id.* at 853. In *Hamilton*, which involved a delay of 36 months, the probationer himself had notified the probation office and the district court of his alleged violation at that time, *i.e.*, failure to complete 22 days of his scheduled 120-day sentence, and

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[18] Petitioner has made no claim that the delay in filing the probation revocation petition was the result of bad faith on the part of the government, and the record does not support such a claim.

Petitioner does assert that "there is no question on this record that it was only the change of probation officers that resulted in the revocation of [his] probation." Pet. 10; see *id.* at 13. While the change in probation officers was no doubt one reason the revocation petition was filed when it was, there is no basis for drawing any negative inference from the effect of a change in personnel. As petitioner concedes, see *id.* at 4, his replacement probation officer imposed a more stringent regime of supervision. It is therefore plausible that the change in personnel prompted a reexamination of petitioner's probation file, since petitioner's former officer, Charles Perkins, had neglected to take action in the face of substantial and corroborated evidence that petitioner had engaged in criminal conduct in violation of the conditions of his probation.

specifically asked the court to reschedule the remaining portion of his sentence, but neither took any corrective action. 708 F.2d at 1414-1415. The Ninth Circuit concluded:

> At some point * * * violations of which the district court has been apprised and upon which the probationer has sought corrective action become stale or are waived as a basis for revoking probation. * * * Three years is beyond that point under the circumstances of this case.

Id. at 1415 (citing *Tyler*, 605 F.2d at 853).

Because the court of appeals in this case affirmed the district court's probation revocation order without issuing an opinion, the basis for its decision is not clear. Even assuming, however, that the court below relied on analysis different from that used in *Tyler* and *Hamilton*, there is still no square conflict among the courts of appeals that warrants further review. *Tyler* and *Hamilton* do not expressly disavow an inquiry into prejudice and bad faith conduct on the part of the government. To the contrary, the circumstances in each of those cases were unusual: the delays were more than two years, and in each case there was deliberate governmental action that affirmatively misled the probationer into believing that any violation would not be used against him. Petitioner's case is readily distinguishable from *Tyler* and *Hamilton*. The delay in petitioner's case was substantially less than in *Tyler* and *Hamilton*, and there was no affirmative government misconduct in this case that misled petitioner the way the defendants in *Tyler* and *Hamilton* were misled.[19] Accordingly, review by this Court is unwarranted.

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[19] Despite petitioner's suggestion (Pet. 10 n.4), neither *United States* v. *Sciuto*, 531 F.2d 842 (7th Cir. 1976), nor *Greene* v. *Michigan Dep't of Corrections*, 315 F.2d 546 (6th Cir. 1963), expressly adopts an approach to analyzing delay in the filing for revocation of probation

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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MAY 1990

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without regard to prejudice or bad faith on the government's part. In *Sciuto*, the court of appeals stated in dicta that "[w]hether the delay [in filing for revocation of probation] was unreasonable depends upon whether [the probationer] deceived the probation officer." 531 F.2d at 847. That passing statement scarcely amounts to a legal principle that a delay, without more, constitutes a violation of the Due Process Clause.

In *Greene*, which involved a delay of over nine years between the alleged parole violation and the arrest of the parolee, the court of appeals stated that failure to "proceed with reasonable diligence to issue and execute a warrant for the arrest of the parolee * * * may result in a waiver of the violation and loss of jurisdiction." 315 F.2d at 547. The court accordingly remanded for a hearing on "whether the parole authorities acted with reasonable dispatch." *Id.* at 548. It therefore does not appear that *Greene* would have authorized dismissal based on the passage of time alone. In any event, both *Sciuto* and *Greene* were decided before this Court's decision in *Lovasco*. The courts therefore did not have occasion to determine how the analysis in *Lovasco* should apply to the probation revocation proceedings in those cases.

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